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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MANUEL GONSALVES,

Defendant and Appellant.

D059300

(Super. Ct. No. SCE283226)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

A jury convicted Joseph Manuel Gonsalves, who sprayed the victim in the face using a can of Raid Hornet and Wasp Killer and later tried to evade pursuing police during a high-speed car chase, of (1) assault with caustic chemicals (count 1: Pen. Code, § 244), and (2) evading a peace officer while driving recklessly (count 3: Veh. Code, § 2800.2, subdivision (a)). At sentencing, the court placed Gonsalves on three years' formal probation after imposing, but suspending execution of, an aggregate prison term of three years eight months, consisting of the midterm of three years for the count 1

assault with caustic chemicals conviction, plus a consecutive term of eight months (one-third the midterm) for the count 3 conviction of evading a peace officer while driving recklessly.

Gonsalves appeals, contending (1) his assault with caustic chemicals conviction must be reversed because Penal Code section 244 is so vague on its face that its application to Gonsalves violated his due process right under the federal and California Constitutions to fair warning and notice of the proscribed conduct; (2) that conviction also must be reversed because the evidence was insufficient to prove the Raid pesticide he sprayed into the victim's face was a "flammable substance" or "caustic chemical" within the meaning of Penal Code section 244; and (3) his conviction of evading a peace officer while driving recklessly must be reversed because the evidence is insufficient to prove that at least one lighted red lamp was visible from the front of the pursuing peace officer's vehicle as required by Vehicle Code section 2800.2, subdivision (a) (hereafter Vehicle Code section 2800.2(a)). We affirm the judgment.

FACTUAL BACKGROUND

A. The People's Case

1. The pesticide assault

On August 14, 2008, Julia Worley, who lived with her husband Scott Worley¹ and their two children on a cul-de-sac in the Picturesque Point neighborhood of the Crest area of San Diego County, noticed a car she did not recognize parked in front of her sister-in-

¹ We will refer to Scott and Julia Worley by their first names for purposes of clarity. We intend no disrespect.

law's nearby home. She observed Gonsalves spraying something in the car and scrubbing, which she found odd. Julia called 911 to report the suspicious activity and then called her husband, who drove home a few minutes later.

Scott parked next to Gonsalves's car and then got out of his truck. Gonsalves was sitting on the curb holding a can. Scott asked him why he was in the neighborhood and whether he was having car trouble or needed help. Gonsalves replied he had every right to be on a public street. Scott thought that was an odd reaction to an offer of help and told Gonsalves that his wife had called the police and he should leave if he did not have a reason to be in the neighborhood. Gonsalves again said he had a right to be on a public street, and Scott, who had a camera, replied, "That's fine. [T]hen you'll have no problem with me taking a picture of your license plate and your car." He then took a picture of Gonsalves's license plate and then walked to the driver's side of the car and took a picture of it. As he was about to take a picture through the window of the car, Gonsalves elbowed him in the chest and tried to push the button on the spray can he was holding. Realizing Gonsalves was holding a can of bug spray, Scott yelled, "Don't spray me. Don't spray me." From a distance of a few inches, Gonsalves hit the trigger of the can of wasp and hornet spray and sprayed Scott in the face for about 15 seconds, drenching him. Scott reached for the can to stop the spraying, Gonsalves fumbled the can, and the two men fell to the ground. Scott put his knee on Gonsalves, who was lying on his back, to keep him down. The camera was knocked out of his hand during the scuffle and broke when it hit the ground. Scott picked up what turned out to be a can of Raid Wasp and

Hornet Killer and sprayed the remainder of the contents into Gonsalves's face, which took only a couple of seconds because the can was almost empty.

Scott testified the substance Gonsalves squirted in his face felt "[g]reasy like diesel," and he felt a "burning sensation." Scott, who worked in construction with heavy equipment, stated he had experience working with oils and "diesel fuel, which is petroleum." He testified the substance on his face "felt very similar to getting diesel on your hand. You can't just wash it off. It's very sticky."

After he sprayed Gonsalves, Scott told him to stay on the ground and then pulled the key out of the ignition of Gonsalves's car and locked the door to prevent him from fleeing before the police arrived. When Scott ran over to his truck to grab a rag to wipe off his face, Gonsalves jumped up, ran to his car, and used a spare key to start the car and drive out of the neighborhood.

Scott drove the short distance back to his home, told his wife what happened, and got in the shower to scrub the pesticide off his face and body. His wife testified his face was "red and puffy," he was soaked "from head to toe," and he reeked of "ant spray."

One of the responding police officers later recovered from the street the empty 14-ounce can of Raid Wasp and Hornet Killer (People's Exhibit No. 4), which was admitted into evidence. The labeling on the can stated "Sprays up to 22 feet" and "Kills on contact"; and warned in both English and Spanish that the product "[c]ontains petroleum distillates" and is "[h]armful if absorbed through skin," the product is "flammable," and "[e]xposure to temperatures above 130[degrees] F[ahrenheit] may cause bursting."

2. The pursuit

Sheriff's Deputies Nicholas Ramirez and Leonard Rodriguez, who were together in a standard black and white patrol car that Deputy Rodriguez was driving, heard a dispatch call regarding an assault in the Crest area, as well as a description of the suspect's vehicle, and responded to the call. In the vicinity of Picturesque Point they noticed a vehicle that matched the description, provided the license plate number to dispatch to confirm it was the vehicle in question, and began to make a traffic stop. Deputy Ramirez activated the siren and the overhead emergency lights, which included one lighted red lamp, and approached Gonsalves's car from behind on winding Mountain View Road, which goes through residential areas.

The vehicle failed to yield and pull over and continued to speed forward. The deputies continued the pursuit, notified dispatch, and followed Gonsalves on La Cresta Road. Although Gonsalves had been driving within the speed limit on Mountain View Road, he increased his speed on La Cresta Road—reaching a speed of about 60 miles per hour in a 35-mile-per-hour zone—and crossed over the double yellow line into oncoming traffic in order to pass cars in front of him. At that point, according to Deputy Rodriguez, he and Deputy Ramirez discontinued the pursuit by turning off the siren and emergency lights because La Cresta Road was also a winding road and it was not safe to cross over into oncoming traffic. They momentarily lost track of Gonsalves, but caught up with him again as he was waiting to turn left onto Greenfield from La Cresta Road. There, at around 5:00 p.m., the deputies reactivated the emergency lights and siren and continued the pursuit.

Accelerating to 60 miles per hour in a 40-mile-per-hour zone, Gonsalves drove past several houses and a school where children were walking on the sidewalk. During the pursuit Gonsalves did not stop at stop signs. The pursuit continued to the area near Granite Hills High School and the adjacent John F. Kennedy Park, and then onto eastbound Interstate 8. At that point, other marked sheriff's vehicles with activated lights and sirens joined the pursuit. A sheriff's ASTREA helicopter flew behind the pursuing sheriff's vehicles along eastbound Interstate 8.

Spike strips were deployed at Pine Valley Road, causing Gonsalves's vehicle to come to a stop. Gonsalves had driven 15 to 20 miles on the freeway before his vehicle was disabled by the spike strips. Gonsalves drove about 40 miles during the entire pursuit.

B. The Defense Case

Gonsalves testified he was relaxing in the cul-de-sac and spraying the inside of his car to get rid of some fruit flies. He was sitting on the curb when Scott approached him, told him he had no right to be there, and said he would be arrested. Gonsalves indicated he had a right to be on a public street. Scott began taking pictures of Gonsalves's car and got inside the car. When Scott reached for the keys in the ignition, Gonsalves showed him the bug spray and told him not to take the car keys or he would spray him. When Scott took the keys, Gonsalves sprayed him because he thought Scott was taking his property or his life might be at stake. Scott ran at Gonsalves, grabbed the can, and both men fell down. Scott then sprayed Gonsalves with the remainder of the bug spray. Gonsalves used a set of spare keys to start his car and drive away.

Gonsalves stated that although he did not hear a siren, he "saw the lights of a police car" as he was driving and thought to himself the police were coming for him. He testified he did not stop because he "did not want [the police] to force [him] to say the wrong thing or look at them the wrong way and listen to them abusing [him]." He previously had bad experiences with police officers. He acknowledged he once drove across the yellow line during the pursuit.

Gonsalves testified that as he was driving to the freeway, something in his mind said, "Go to El Centro where you were heading for, and your father will meet you there." On cross-examination, he acknowledged his father was deceased.

DISCUSSION

I

CONSTITUTIONALITY OF PENAL CODE SECTION 244

Gonsalves first contends his conviction of assault with caustic chemicals must be reversed because Penal Code section 244 is so vague on its face that its application to him violated his due process right under the federal and California Constitutions to fair warning and notice of the proscribed conduct. We reject this contention.

A. Applicable Legal Principles

1. Void for vagueness doctrine

"The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution, each guarantee that no person shall be deprived of life, liberty, or property without due process of law. This constitutional command requires 'a reasonable degree of certainty in legislation, especially in the criminal

law ' " (*People v. Heitzman* (1994) 9 Cal.4th 189, 199, quoting *In re Newbern* (1960) 53 Cal.2d 786, 792.)

A criminal statute is void for vagueness if it fails to provide adequate notice to ordinary people of the kind of conduct prohibited or if it authorizes arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357; *People v. Heitzman, supra*, 9 Cal.4th at p. 199.) Only a reasonable degree of certainty is required, however, and there is a strong presumption in favor of the constitutionality of statutes; thus, a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107.)

" 'Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct . . . a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that "the law is impermissibly vague in all of its applications." ' " (*People v. Kelly* (1992) 1 Cal.4th 495, 533-534, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201.)

B. Analysis

Penal Code section 244, the constitutionality of which Gonsalves challenges under the void-for-vagueness doctrine, provides:

"Any person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, *flammable substance*, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of that person, is punishable by imprisonment in the state prison for two, three or four years." (Italics added.)

The statute then defines the term "flammable substance" as follows: "As used in this section, 'flammable substance' means gasoline, *petroleum products*, or *flammable liquids with a flashpoint of 150 degrees Fahrenheit or less*." (Italics added.)

Gonsalves first contends Penal Code section 244 is unconstitutionally vague on its face because although the statute defines flammable substance to include petroleum products, it "fails to give notice as to what type of petroleum product is intended" because it "omits any description as to what is meant by petroleum products" and the term "petroleum products" is not found in the dictionary; thus, the statute also "does not provide sufficient standards for police and prosecutors and fails to prevent arbitrary and discriminatory enforcement, thereby violating due process." This facial challenge is unavailing.

As a preliminary matter, Gonsalves invites this court to go outside the record on appeal and visit a specified Web site where, he suggests, we will find support for his assertion that "[m]any everyday items contain petroleum including shampoo, detergents, and shaving cream." This is improper. It is a well-established general rule of appellate

practice that "[a]ppellate jurisdiction is limited to the four corners of the record on appeal." (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) Here, any evidence that may be available through the Web site cited by Gonsalves is not contained within the four corners of the appellate record; thus, this court may not consider it.

We reject Gonsalves's claim that Penal Code section 244 is unconstitutionally vague on its face because we conclude (1) the statute is reasonably certain (see *Tobe v. City of Santa Ana*,, *supra*, 9 Cal.4th at p. 1107), and (2) Gonsalves has not shown, and cannot show, the statute is impermissibly vague in all of its applications (see *People v. Kelly*, *supra*, 1 Cal.4th at pp. 533-534). Gonsalves's facial challenge focuses on the meaning of the term "petroleum products," which is one of the examples listed by the statute in defining the broader term "flammable substance." Penal Code section 244 is reasonably certain for purposes of the due process clauses of the federal and California Constitutions because it provides adequate notice to ordinary people of the kind of flammable substance, including petroleum products, the proscribed willful or malicious use of which, with the requisite specific intent, will result in criminal liability. Gonsalves suggests the term "petroleum products" is so impermissibly vague it might include everyday household items such as shampoo and shaving cream. However, we are persuaded that any person of ordinary intelligence would understand from the plain language of the statute that the terms "flammable substance" and "petroleum products" do not include innocuous household products. The statute specifically requires proof that the defendant—in throwing, placing, or causing to be thrown or placed "any vitriol, corrosive acid, flammable substance, or caustic chemical" upon the victim's

person—acted with intent to "injure the flesh or disfigure the body" of the victim. As a matter of common sense, the foregoing plain statutory language shows the substance in question must be capable of injuring the victim's flesh or disfiguring his or her body. This is also shown by the nature of the two other examples set forth in the statute regarding what constitutes a flammable substance: "gasoline" and "flammable liquids with a flashpoint of 150 degrees Fahrenheit or less," both of which are clearly capable of injuring a victim's flesh or disfiguring his or her body. We conclude Gonsalves has not shown, and cannot demonstrate, either that Penal Code section 244 fails to give notice as to what type of petroleum product is intended or that it impermissibly permits arbitrary and discriminatory enforcement by police and prosecutors. (See *Kolender v. Lawson*, *supra*, 461 U.S. at p. 357; *People v. Heitzman*, *supra*, 9 Cal.4th at p. 199.)

Gonsalves also has not shown, and cannot demonstrate, that Penal Code section 244 is impermissibly vague in all of its applications. (See *People v. Kelly*, *supra*, 1 Cal.4th at pp. 533-534.) As noted, the statute specifically lists gasoline as an example of what constitutes a flammable substance. It is common knowledge that gasoline is a petroleum product. Penal Code section 244 is not impermissibly vague in its application to this type of petroleum product.

Gonsalves also contends Penal Code section 244 is unconstitutional as it is applied to him because he "would not know that the bug spray he happened to have in his hand would be a 'petroleum product.' " This contention is refuted by the labeling on the can of Raid Wasp and Hornet Killer that Gonsalves used, which expressly warned him that the bug spray inside the can "[c]ontains petroleum distillates" and is "[h]armful if absorbed

through skin." An ordinary person of reasonable intelligence would understand that a product containing petroleum distillates is a petroleum product.

II

SUFFICIENCY OF THE EVIDENCE (COUNT 1: ASSAULT WITH CAUSTIC CHEMICALS)

Gonsalves next contends his assault with caustic chemicals conviction must be reversed because the evidence was insufficient to prove the Raid Hornet and Wasp Killer he sprayed into Scott's face was a flammable substance or caustic chemical within the meaning of Penal Code section 244. We conclude substantial evidence supports this conviction.

A. Standard of Review

When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that any reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction or true finding on an enhancement allegation, "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284,

296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

B. *Analysis*

As noted, Penal Code section 244 expressly applies to any flammable substance or caustic chemical, and specifically defines the term "flammable substance" to mean "flammable liquids with a flashpoint of 150 degrees Fahrenheit or less." The statute does not define the term "caustic chemical."

The court admitted into evidence the can of Raid Wasp and Hornet Killer that Gonsalves used when he sprayed the pesticide into Scott's face. We conclude the warning labeling on the can provides substantial evidence that the can contained a flammable substance within the meaning of Penal Code section 244. Specifically, the labeling on the front of the can stated, "Contains petroleum distillates." The labeling on the back of the can contained the following warning that the can should not be exposed to temperatures above 130 degrees Fahrenheit:

"PHYSICAL/CHEMICAL HAZARDS:

"FLAMMABLE. CONTENTS UNDER PRESSURE. Keep away from fire, sparks, and heated surfaces. . . . Exposure to temperatures above 130[degrees] F[ahrenheit] may cause bursting. Do not place on stove, radiator or place where temperature exceeds 130[degrees] F[ahrenheit]."

The warning against exposure to temperatures above 130 degrees Fahrenheit is substantial evidence from which any rational jury could find beyond a reasonable doubt that the bug spray was a "flammable liquid[]" with a flashpoint of 150 degrees Fahrenheit

or less," and thus it constituted a flammable substance within the meaning of Penal Code section 244.

The warning labeling on the can also provides substantial evidence that the can contained a caustic chemical within the meaning of Penal Code section 244. Merriam-Webster's Collegiate Dictionary (11th ed. 2006) at page 197 defines the adjective "caustic" as "capable of destroying or eating away by chemical action." Here, the labeling on the front of the can read, "Kills on Contact!" and "Kills the Entire Nest!" The labeling on the back warned that the contents were "[h]armful if absorbed through skin. Avoid contact with eyes, skin or clothing." A rational jury could reasonably infer from this evidence that the pesticide Gonsalves sprayed into Scott's face contained chemicals that were capable of "destroying or eating away" his skin by chemical action, and, thus, was a caustic chemical within the meaning of Penal Code section 244. Scott's testimony that he felt a burning sensation on his face and eyes after he was sprayed supports this conclusion.

III

SUFFICIENCY OF THE EVIDENCE *(COUNT 3: EVADING A PEACE OFFICER WHILE DRIVING RECKLESSLY)*

Last, Gonsalves contends his felony conviction of evading a peace officer while driving recklessly must be reversed because the evidence is insufficient to prove that at least one lighted red lamp was visible from the front of the pursuing peace officer's vehicle as required by Vehicle Code section 2800.2(a). We conclude substantial evidence supports this conviction.

A. Statutory Provisions

Vehicle Code section 2800.2(a) provides in part:

"If a person flees or attempts to elude a pursuing peace officer in violation of [Vehicle Code] Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year."

Vehicle Code section 2800.1 subdivision (a) (hereafter Vehicle Code section 2800.1(a)), the misdemeanor statute referenced in Vehicle Code section 2800.2(a), provides:

"Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year if all of the following conditions exist: [¶] (1) *The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.* [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform." (Italics added.)

Thus, a conviction of evading a peace officer while driving recklessly in violation of Vehicle Code section 2800.2(a) requires, in addition to proof of other essential elements, proof that the pursuing peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front. (Veh. Code, § 2800.1(a).)

B. Analysis

Gonsalves contends his count 3 felony conviction must be reversed and the matter remanded for a new trial as to that count because there is no evidence Deputy Ramirez

reactivated his red emergency light after he deactivated that light when he discontinued what Gonsalves calls the "first evading," which he asserts was only "a misdemeanor because no willful or wanton disregard for the safety of persons or property was established." Acknowledging that Deputy Ramirez testified he could see the activated red light emanating from the front of his sheriff's vehicle, Gonsalves asserts that "[t]he point at which [Deputy] Ramirez testified he could see the red light was *prior* to following [Gonsalves] onto La Cresta Road." Gonsalves misconstrues the evidentiary record.

Deputy Ramirez testified he approached Gonsalves's car from behind on Mountain View Road and initiated a traffic stop after activating the siren and the overhead emergency lights, including the red lamp. Gonsalves failed to yield and pull over and continued to speed forward. Deputy Ramirez and Deputy Gonzalez continued the pursuit and followed Gonsalves on La Cresta Road. During his own testimony, Gonsalves admitted he "saw the lights of a police car" and thought to himself the police were coming for him.

Deputy Ramirez also testified that although Gonsalves had been driving within the speed limit on Mountain View Road, he increased his speed on La Cresta Road—reaching a speed of about 60 miles per hour in a 35-mile-per-hour zone—and crossed over the double yellow line into oncoming traffic in order to pass cars in front of him. At that point, Deputy Ramirez discontinued the pursuit by turning off the siren and emergency lights because La Cresta Road was a winding road and it was not safe to cross over into oncoming traffic.

Deputy Ramirez's foregoing testimony establishes that the red emergency light on his sheriff's vehicle was activated and visible to Gonsalves *after* Gonsalves began driving recklessly on La Cresta Road and *before* Deputy Ramirez temporarily turned off that red light and discontinued the pursuit. From this substantial evidence, a rational jury could find beyond a reasonable doubt that Gonsalves's commission of the felony offense of evading a peace officer while driving recklessly in violation of Vehicle Code section 2800.2(a) was complete before Deputy Ramirez temporarily deactivated the red emergency light. Accordingly, we affirm Gonsalves's conviction of this felony offense.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.